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No. 04-373

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

LEEANDER JEROME BLAKE,
Respondent.

On Writ of Certiorari To The Court of Appeals of Maryland

BRIEF FOR PETITIONER

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QUESTION PRESENTED

When a police officer improperly communicates with a suspect after invocation of the suspect's right to counsel, does *Edwards v. Arizona*, 451 U.S. 477 (1981), permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding in the Court of Appeals of Maryland.

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STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland reversing the judgment of the Court of Special Appeals of Maryland was filed on May 12, 2004. The Court of Appeals denied a motion for reconsideration on June 16, 2004. The petition for writ of certiorari was filed within 90 days of the denial of the motion for reconsideration, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:
Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maryland Rule 4-212, which provides that the police shall serve a copy of the charging document promptly after the arrest, is reproduced as an appendix to this brief at App. 1a-4a.

STATEMENT OF THE CASE

A. Circumstances of the Arrest and Statements

On September 19, 2002, Straughan Lee Griffin was shot and killed in front of his home in Annapolis, Maryland. (JA 397). His assailants shot him in the head, stole his automobile, and ran over his body as they fled the scene. (JA 397).

Detective William Johns was the lead investigator on the homicide. (JA 14-15). On October 25, 2002, Terrence Tolbert was arrested in connection with the homicide and implicated Blake. (JA 15-16, 340). A warrant for Blake's arrest was issued that same day. (JA 41-42). On the following day, October 26, 2002, the Annapolis police executed the arrest and search warrants at Blake's home. (JA 42, 91). Prior to the arrest, Sergeant Greg Kirchner, Detective Johns's supervisor, (JA 237), instructed all officers present at a briefing not to speak to Blake about the crime should they encounter him at the house. (JA 237-238).

Shortly after 5:00 a.m., the authorities arrested Blake at his home. (JA 15, 238). Blake was transported to the Annapolis Police Department, where Detective Johns advised Blake of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). (JA 16). At 5:11 a.m., Blake indicated that he did not want to talk to the police without an attorney. (JA 19-20, 51; State's Exhibit 1). Accordingly, no further questions were asked of him, and Corporal Hannon placed Blake in a holding cell at the police department at 5:25 a.m. (JA 21, 57).

At 6:00 a.m., Detective Johns went to Blake's cell and handed him a copy of his arrest warrant and statement of charges, explained what the charges were, and told him to read the document carefully. (JA 22-23).[1] Officer Curtis Reese, a uniformed patrol officer who transported Blake to the police station, but otherwise had no role in the investigation, (JA 22, 242), had walked back to the holding cell with Detective Johns. (JA 23). As Detective Johns turned to walk out, Officer Reese said, "I bet you want to talk now, huh?" (JA 23).

Surprised and angry by the unexpected comment, Detective Johns said, very loudly: "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." (JA 23). Detective Johns testified that Blake would have heard his admonition to Officer Reese. (JA 24).

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[1] Under Maryland Rule 4-212(e), a copy of the warrant and charging document are to be served on a defendant "promptly after the arrest." The statement of charges, and the application for statement of charges, were admitted as State's Exhibit 6 and Defendant's Exhibit A. (JA 88-89). The substance of the statement of charges provided to Blake is reproduced in the Joint Appendix, (JA 329-341), but given the formatting requirements of the appendix, reference to the Exhibits illustrates more accurately what Blake saw when he was provided the statement of charges.

Detective Johns then put his hands in front of him and pushed Officer Reese out of the cell block. (JA 23, 240). Detective Johns testified that he did not want Officer Reese to say anything more that could be heard by Blake and he did not want to hear anything Blake might say. (JA 23-24). The detective then reported the incident to his supervisor, Sergeant Kirchner. (JA 25, 239-240).

Approximately thirty minutes after giving Blake the charging papers, Detective Johns returned to the holding cell to give Blake clothes that had been delivered to the police department. (JA 25).[2] Detective Johns walked to the front of Blake's cell, said, "Here's some clothes for you," and handed the clothes to Blake. (JA 26). As Detective Johns was about to leave the cell, Blake asked, "I can still talk to you?" (JA 26). Detective Johns asked whether Blake was saying that he wanted to talk to Johns. (JA 26). Blake replied, "Yes." (JA 26). Blake returned to the interview room and was advised again of his *Miranda* rights. (JA 28). At 6:40 a.m., he agreed to provide a statement without an attorney. (JA 28; State's Exhibit 2). Blake's demeanor was calm, as it previously had been, (JA 32), and there was no hesitation from Blake about speaking to Detective Johns. (JA 36).

Subsequent to making a statement to Detective Johns, Blake agreed to take a polygraph test, (JA 37; State's Exhibit 3); he appeared to be excited and wanted to take the polygraph. (JA 251). This test was administered at the Maryland State Police barracks by Corporal White, after additional *Miranda* advisements, at approximately 9:15 a.m. (JA 37, 102-104; State's Exhibit 4). Blake was "very eager" to speak with Corporal White. (JA 103). After the administration of the

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[2] When Blake was arrested, he was wearing a tank top, which Blake described as a muscle shirt with cutoff sleeves, and boxer shorts. (JA 176).

polygraph, Blake gave additional statements. (JA 38, 109).

Blake was 17 years old, with a date of birth of June 1, 1985. (JA 105, 124). He was a junior in high school, and he and his mother believed that he was an intelligent youth. (JA 127). Blake wanted to go to college and become an electrician. (JA 127).

Blake testified at the suppression hearing that he decided to talk to the authorities after hearing Officer Reese's comment and then seeing the charges he was facing, including a possible death penalty. (JA 192). In addition, when he read the complete charges, he saw for the first time that Tolbert said that he shot the victim, took the car keys from the victim's pocket, and ran over the victim while leaving the scene. (JA 215-217). Blake stated that Tolbert was the one who did those things. (JA 217-218). He testified that he felt angry and betrayed, and he wanted the police to know the truth. (JA 218).

Blake's statements were not admitted into evidence at the suppression hearing. The parties agreed, however, that there was evidence from Blake's statement to Detective Johns, and his subsequent statements after the polygraph, that the State desired to use against him at trial. (JA 279).

B. Suppression Court's Ruling

On June 3, 2003, the suppression court issued an oral ruling granting Blake's suppression motion. (JA 344-368). After discussing the case law relevant to statements by a defendant after advisement and invocation of *Miranda* rights, (JA 347-354), the suppression court recounted some of the factual background relating to Blake's arrest pursuant to warrant, noting that Blake was "a 17 year old young man removed by force on a chilly October morning somewhere between 4:30 and 5:00 o'clock in the morning." (JA 354-355). He was "[r]emoved from his home in his underwear with no shoes on," and "taken directly to a police car out front and

driven three to four miles to the Annapolis Police Department." (JA 355). The court continued:

> This 17 year old is of average intelligence. Can read and write. Completed the tenth grade. Had thoughts of going to college and becoming an electrician. And was very polite and cooperative with authority figures.
>
> This 17 year old had been arrested for drug charges on two prior occasions, but had never been advised of Miranda rights or interrogated by police before. He was sober, not on any medication, had used marijuana numerous times in the past, but there was no evidence of any use near the time of his arrest. He indicated he had a sip of alcohol at 9:00 or 10:00 the previous evening.

(JA 355).

The suppression court determined that Blake had been advised of his *Miranda* rights, that he had invoked his right to have counsel present during questioning, and that he signed the advice of rights form at 5:11 a.m. (JA 355-356). The court further found that, until the charging papers were served on him by Detective Johns some fifty minutes later, Blake had not been told of Tolbert's accusations, blaming Blake for the murder. (JA 355-356). The suppression court held that Officer Reese's statement when the charging document was presented, suggesting that Blake would want to talk, constituted interrogation notwithstanding the immediate corrective action by Detective Johns. (JA 357-361). Therefore, the court concluded, Officer Reese's comment constituted a violation of the holdings of *Miranda* and *Edwards*. (JA 361).

The suppression court then considered the impact of Officer Reese's improper remark in addressing the issue of whether Blake's waiver of his right to counsel was knowing and voluntary. (JA 363). Aside from the one remark from Officer Reese, the court found that "there had been no other

threats, physical coercion, or promises made at this point to get the Defendant to talk." (JA 363). The court stated that "[o]nly 28 minutes" elapsed between Officer Reese's remark and Blake's initiation of contact with Detective Johns, and "one hour and 17 minutes since he invoked his right to counsel." (JA 364). The court further found that Blake was "still 17 years old. Still undressed. Still in a cold cell, where he is facing death. And an officer had made a case for him to speak now through that officer's coercive statement." (JA 364). The court recognized that Blake had conceded that, in reading the charging papers, "he learned that Tolbert blamed the murder on him and that he wanted the police to know the truth about these statements[,]" (JA 365), but concluded that "[t]he State has not met its heavy burden of proving a voluntary, knowing, and intelligent waiver or showing that he was not still suffering under the impact of Reese's unlawful course of interrogation." (JA 365).

With respect to the statements made during the course of the polygraph examination, the court found that there was "one continuous course of conduct beginning with Office[r] Reese's statement," and no break in the chain of events to prove attenuation. (JA 366). Accordingly, the court held that the State had failed to establish that Blake's waiver of the right to counsel was not the result of the prior interrogation in violation of *Edwards*, and granted Blake's motion to suppress. (JA 366).

C. Appellate Court Proceedings

The Court of Special Appeals of Maryland reversed. (JA 369-388). The court reviewed both Supreme Court and Maryland case law addressing what does and does not constitute interrogation, (JA 379-387), and concluded that "[t]he comment by Officer Reese was a blurt; viewed objectively it was rhetorical in nature, and there was no actual questioning of appellee." (JA 388). In finding that there was

no interrogation, the court stated:

> The comment was an obvious reference to the evidence in the possession of the police, as reflected in the application for charges. Regardless of what Officer Reese's intent might have been, the totality of the events indicate that appellee was not expected to respond, and he did not respond. There is no evidence that the events were part of a practice by the police designed to elicit incriminating information; it is to the contrary. Appellee was not "badgered" or subjected to "compelling influences" or "psychological ploys."

(JA 388) (citations omitted). Maryland's intermediate appellate court reasoned that "[t]he statement by Officer Reese was not the functional equivalent of actual questioning," but rather "was a reference to the evidence against the person in custody that the police had in their possession." (JA 388). Because the court found that the suppression court's decision rested on a finding that there had been interrogation in violation of *Miranda* and *Edwards*, and not a finding that Blake's statements were otherwise involuntary, (JA 378), the court reversed the order suppressing Blake's statements. (JA 388).

The Court of Appeals of Maryland reversed the judgment of the Court of Special Appeals of Maryland. (JA 395-419). Based on its review of Supreme Court law subsequent to *Rhode Island v. Innis*, 446 U.S. 291 (1980), and *Edwards*, including *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), the court held that, pursuant to *Innis*, Officer Reese's comment to Blake after Blake invoked his right to counsel was the functional equivalent of interrogation and not a rhetorical question. (JA 407-413). The court did not believe that the subsequent actions of Detective Johns cured the violation. (JA 417). In assessing whether Blake subsequently initiated further contact, the court looked at various factors, including that Blake was given a statement of charges that indicated that the penalty for first

degree murder was death, although Blake was ineligible for the death penalty because he was a juvenile. (JA 416-417).[3] The court found "no break in custody or adequate lapse in time sufficient to vitiate the coercive effect of the impermissive interrogation." (JA 417). Stating that the record supported the suppression court's finding that Blake's inquiry was in direct response to, and the product of, Officer Reese's unlawful interrogation, the Court of Appeals held that Blake himself did not initiate contact with the police after invoking his *Miranda* rights. (JA 417-418).

SUMMARY OF ARGUMENT

In *Edwards v. Arizona*, this Court created a bright-line rule to protect the Constitutional right against compelled self-incrimination and ensure that a suspect retains the choice whether to talk to the police. This Court held that once an accused invokes his right to counsel, a subsequent waiver of

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[3] The Maryland Court of Appeals earlier quoted the suppression court as finding that the statement that Blake was subject to the penalty of death, when in fact he was not, "was either done intentionally or by mistake." (JA 402). The court, however, deleted the remaining factual finding of the suppression court that this error was a mistake. (JA 357). Indeed, an affidavit from a commissioner that the State attached to its written memorandum shows that the penalty on the statement of charges is computer generated and the penalty for first degree murder is always listed as "Death." (JA 342; R. 170). A later determination as to the age and mental capacity of a given defendant might make the defendant ultimately ineligible for the death penalty, *see* Md. Code Ann., Art. 27, § 412 (2001 Supp.), as was the case here, but that stage had not yet been reached at the time Blake received the papers.

rights is presumed involuntary if the only showing is that the accused responded to further police-initiated custodial interrogation.

The purpose of the *Edwards* rule is to prevent police badgering after invocation of the right to counsel. Recognizing the value of confessions to the criminal justice system, however, the *Edwards* rule allows for an accused who has invoked his right to counsel to change his mind and initiate further communication. Where the accused initiates further communication, the presumption of an involuntary waiver is inapplicable and the court proceeds to consider the voluntariness of the waiver under the totality of the circumstances.

In determining whether an accused has initiated further contact with the police, the entire course of conduct of the police after invocation of the right to counsel should be considered. A single improper comment by a police officer after a suspect's invocation of the right to counsel should not preclude a finding that the suspect subsequently initiated further contact with the police. Rather, the court should consider all of the circumstances after invocation of the right to counsel to determine if the objectives of *Edwards* are satisfied. Where curative measures and other intervening factors after an improper police comment show that the police honored the suspect's choice whether to speak, and the suspect changed his mind, the suspect should be found to have initiated contact.

In this case, Blake's choice whether to speak to the police was honored, and Blake initiated further contact with the police. Although Officer Reese made an improper comment after Blake invoked his right to counsel, Detective Johns immediately took action that cured the impropriety, terminated any police-initiated interrogation, and left it up to Blake to choose whether he wished to speak without an attorney present. Blake chose to speak with the police after reading in the charging document that Tolbert, his co-defendant, was pinning

the blame for the murder on him. Because Blake initiated further contact, the purpose of *Edwards* was satisfied, and *Edwards*'s presumption of involuntariness is inapplicable.

ARGUMENT

WHEN A POLICE OFFICER IMPROPERLY COMMUNICATES WITH A SUSPECT AFTER INVOCATION OF THE SUSPECT'S RIGHT TO COUNSEL, *EDWARDS* PERMITS CONSIDERATION OF CURATIVE MEASURES BY THE POLICE, OR OTHER INTERVENING CIRCUMSTANCES, TO CONCLUDE THAT A SUSPECT LATER INITIATED COMMUNICATION WITH THE POLICE.

"Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic." *Michigan v. Tucker*, 417 U.S. 433, 446 (1974). In the *Edwards* context, an improper police comment in violation of a suspect's earlier invocation of the right to counsel should not forever preclude a suspect from changing his mind and initiating further communication with the police.[4] Rather, the determination whether an accused initiated communication

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[4] Although Maryland argued in the state courts that Officer Reese's statement did not constitute interrogation, or the functional equivalent of interrogation, within the meaning of *Rhode Island v. Innis*, 446 U.S. 291 (1980), Maryland did not present that question to this Court and is therefore assuming that it was interrogation.

with the police should be made in a manner that is consistent with the purpose of the rules of *Miranda* and *Edwards*, which "serve to protect a suspect's voluntary choice" whether to speak to the police. *Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring). Where, as here, curative measures or intervening circumstances after the initial impropriety show that this purpose was satisfied and that it was the accused's choice to initiate further communication with the police, exclusion of a subsequent voluntary statement is not required by *Edwards*.

A. The purpose of *Miranda* and *Edwards* is to prevent police badgering after a suspect invokes his rights, while at the same time allowing a suspect to initiate further communication with the police.

The Fifth Amendment privilege against self-incrimination, made applicable to the States by the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. To that end, this Court has adopted "several prophylactic rules designed to protect the core privilege against self-incrimination." *United States v. Patane*, 124 S.Ct. 2620, 2627 (2004) (plurality opinion).

In *Miranda*, this Court held that, to have an adequate opportunity to exercise the privilege against self-incrimination, "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 U.S. at 467. Accordingly, the Court adopted a prophylactic rule that requires the police to advise a suspect in custody of various rights, including the right to remain silent and the right to have a lawyer present during questioning. *Id.* at 444. This rule gives "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.* at 441-42.

In *Edwards*, the Court adopted an additional prophylactic rule for cases in which a suspect invokes the right to counsel under *Miranda*. The Court held that when the accused has invoked his right to counsel, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation." 451 U.S. at 484. Once an accused invokes his right to counsel, police interrogation is permissible only if "the accused himself initiates further communications, exchanges or conversations with the police." *Id.* at 484-85. The "bright-line" *Edwards* rule set forth a "new test" for "when [a waiver of the right to counsel] would be acceptable once the suspect had invoked his right to counsel: the suspect had to initiate subsequent communication." *Solem v. Stumes*, 465 U.S. 638, 646 (1984).

The *Edwards* rule raises the presumption that an accused who invokes the right to counsel is unable to respond voluntarily to police-initiated questioning without the advice of counsel. *See Arizona v. Roberson*, 486 U.S. 675, 681-82 (1988) (presumption that waiver after invocation of right to counsel is involuntary applies to police-initiated interrogation in a separate investigation). That presumption, however, is inapplicable when the accused initiates further communication with the police. As this Court clarified in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (plurality opinion), once it is determined that the accused "initiated" further communication, the next inquiry is

> "whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities."

Id. at 1046 (quoting *Edwards*, 451 U.S. at 486 n.9).[5]

Miranda and *Edwards* were not designed to eliminate confessions; the prophylactic rules were enacted to protect the accused's choice whether to speak to the police. The "fundamental purpose" of *Miranda* is "'to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.'" *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (quoting *Miranda*, 384 U.S. at 469). The accused must be "free to exercise his own volition" in deciding whether to make a statement to police. *Oregon v. Elstad*, 470 U.S. 298, 308 (1985).

To protect the accused's right to choose, *Miranda* requires procedures that both warn the accused of his right to remain silent and "assure the suspect that the exercise of that right will be honored." *Dickerson v. United States*, 530 U.S. 428, 442 (2000). Thus, in *Michigan v. Mosley*, 423 U.S. 96, 103-07 (1975), where the police "scrupulously honored" Mosley's decision not to speak by terminating questioning upon invocation of his right to remain silent, this Court held that there was no *Miranda* violation when a different officer interrogated Mosley on a different occasion about a different crime.

To be sure, the Court in *Edwards* held that additional

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[5] The issue before the Court in this case concerns the first step of the analysis, whether Blake initiated further communication with the police. The Maryland Court of Special Appeals, Maryland's intermediate appellate court, found that the suppression court's decision rested on a finding that Officer Reese's comment constituted interrogation in violation of *Miranda* and *Edwards*; it was not a finding that Blake's statements otherwise were involuntary. (JA 378). The Maryland Court of Appeals did not refute that finding.

safeguards are necessary when the accused invokes his right to counsel. The rule prohibiting police-initiated interrogation after invocation of the right to counsel was designed to prevent police from badgering an accused into waiving his *Miranda* rights. *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990). In *Minnick*, the Court held that when counsel is requested, interrogation must cease and the police may not reinitiate interrogation without counsel present, even where the accused has consulted with his attorney. *Id.* at 153. The Court expressed concern with "*persistent attempts* by officials to persuade [the accused] to waive his rights . . . ." *Id.* at 153 (emphasis added). *Accord Davis v. United States*, 512 U.S. 452, 458 (1994) (*Edwards* "'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights'") (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)); *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam) (*Edwards* precludes authorities from badgering or overreaching that might "otherwise wear down the accused and persuade him to incriminate himself"); *Oregon v. Bradshaw*, 462 U.S. at 1044 (*Edwards* is "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was"); *see also Patterson v. Illinois*, 487 U.S. 285, 291 (1988) (the essence of *Edwards* is "[p]reserving the integrity of an accused's choice to communicate with police only through counsel"); *Michigan v. Jackson*, 475 U.S. 625, 635 (1986) (*Edwards* rejected notion that "acquiescence" in police-initiated questioning, after invocation of the right to counsel, could establish a valid waiver).

The facts of *Edwards* demonstrate that the risk of police badgering after a request for counsel was the impetus for the rule. After Edwards was given his *Miranda* warnings and stated that he wanted an attorney, all questioning ceased. *Id.* at 479. The next morning, however, two different officers came to the jail to speak with him. *Id.* The Court highlighted that

"[t]his was not at his suggestion or request." *Id.* at 487. Indeed, Edwards told the detention officer that he did not want to talk to anyone, but the guard told Edwards "he had" to talk. *Id.* at 479. After Edwards was again informed of his *Miranda* rights, he gave a statement. *Id.* Because Edwards did not reinitiate communication with the police, but was told that "he had" to speak with the police after he had invoked his right to counsel, this Court found that the use of Edwards's confession at trial violated his rights under the Fifth and Fourteenth Amendments as construed in *Miranda*. *Id.* at 480.

Although this Court adopted the prophylactic rules in *Miranda* and *Edwards* to ensure that a suspect retains the right to choose whether to remain silent or speak to the police, the Court has never condemned the police practice of obtaining confessions for use at criminal trials. Indeed, this Court repeatedly has recognized the value and desirability of confessions in the criminal justice system. In *Moran v. Burbine*, 475 U.S. 412 (1986), this Court stated that "'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted. Admissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Id.* at 426 (citations omitted). *Accord McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) ("the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good"); *Oregon v. Elstad*, 470 U.S. at 305 ("'far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable . . . .'") (quoting *United States v. Washington*, 431 U.S. 181, 187 (1977)); *Michigan v. Tucker*, 417 U.S. at 449 n.23 (voluntary confessions "advance the cause of justice and rehabilitation").

"'[A] blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police

investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.'" *Edwards*, 451 U.S. at 491 n.1, (Powell, J., concurring) (quoting *Michigan v. Mosley*, 423 U.S. at 102). Indeed, the *Edwards* rule expressly contemplates that the accused, after invoking his right to counsel, retains the choice whether to initiate further communication with the police.

In *Edwards*, the Court underscored that its decision did not "hold or imply that Edwards was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by Edwards prior to his having access to counsel." *Id.* at 485. The Court stressed that "[h]ad Edwards initiated the meeting," nothing would have prevented the police from listening to his volunteered statements and using them against him at trial. *Id. Accord Arizona v. Roberson*, 486 U.S. at 681 (expressing concern with a waiver of the right to counsel that "has come at the authority's behest, and not at the suspect's own instigation").

"It is not unusual for a person in custody who previously has expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome an opportunity to talk." *Edwards*, 451 U.S. at 490 (Powell, J., concurring). There are many reasons why an accused might reconsider his decision whether to speak to the police. For example, an accused might reinitiate conversation if he found out that the case against him was unusually strong, and his cooperation with authorities would result in a reduced charge. *Id.* at 491 (citing *Michigan v. Mosley*, 423 U.S. at 109 n.1 (White, J., concurring in result)). Similarly, as was the case here, an accused may decide that it is in his best interest to give his version of the events after learning that a co-defendant is pinning all the blame on him. Whatever the reason, *Edwards* gives an accused the choice to change his mind and initiate further communication with the police.

B. An improper comment by a police officer after a suspect has invoked the right to counsel should not preclude a finding that a suspect has initiated further contact when curative measures, and other intervening circumstances, demonstrate that the police honored the suspect's choice whether to speak without counsel.

Although the Court was clear in *Edwards* that an accused can initiate further communication with the police after invoking the right to counsel, it did not delineate what constitutes "initiation." Several years later, in *Oregon v. Bradshaw*, 462 U.S. at 1043-46, this Court addressed what constitutes initiation generally. After Bradshaw invoked his right to counsel, and as he was being transported to the jail, he asked, "Well, what is going to happen to me now?" *Id.* at 1042. A plurality of the Court found that this question constituted initiation "in the ordinary dictionary sense of that word." *Id.* at 1045. Although acknowledging that not every statement by a defendant or a police officer would constitute initiation of further conversations, the plurality found that Bradshaw's question "evinced a willingness and a desire for a generalized discussion about the investigation" and was "not merely a necessary inquiry arising out of the incidents of the custodial relationship." *Id.* at 1045-46.

Blake's question to Detective Johns, asking if he could still talk to Johns, certainly "evinced a willingness and a desire" to talk about the investigation; it was an explicit and unequivocal request to talk to the police. The Maryland Court of Appeals recognized that Blake's question constituted initiation in the "dictionary sense." (JA 416). It held, however, that it was not initiation in the "legal sense" because Officer Reese's statement constituted interrogation in violation of *Edwards*, and Blake could not thereafter "initiate" further contact unless there had been a break in custody or a substantial lapse of time sufficient to vitiate the effect of Reese's comment. (JA 416-417).

A single impropriety by the police, however, should not disable an accused from initiating further contact with the police. Rather, the analysis of initiation should focus on the entire course of conduct after invocation of the right to counsel, in light of the objective of *Edwards*. The accused should be found to have initiated contact when curative measures and other intervening circumstances after an improper comment show that the police honored the accused's choice whether to speak and the accused made the choice to speak without counsel.

The rule Maryland proposes is consistent with preserving *Edwards*'s "clear and unequivocal" guidelines, *see Arizona v. Roberson*, 486 U.S. at 682, by maintaining the presumption that a waiver is involuntary if the prosecution shows "only that [the accused] responded to further police-initiated custodial interrogation," *Edwards*, 451 U.S. at 484. Maryland's proposed rule, however, allows consideration of all the circumstances to determine if the presumption is applicable, or whether, under the circumstances, the accused initiated further communication. This approach satisfies the purpose of *Edwards*, while at the same time recognizing the imperfections of police investigation. Mistakes may occur, but they can be cured.

This Court has held, in contexts other than invocation of the right to counsel, that initial improper police conduct is not a per se bar to the admission of a subsequent voluntary statement as long as the purpose of *Miranda* is not thwarted. This Court should similarly hold in the *Edwards* context.

In *Oregon v. Elstad*, 470 U.S. at 300, this Court held that an initial failure of law enforcement officers to give *Miranda* warnings did not, without more, "taint" a subsequent statement "made after a suspect has been fully advised of and has waived his *Miranda* rights." The Court found that the initial impropriety did not render the subsequent statement inadmissible under the "fruit of the poisonous tree" doctrine

used in the Fourth Amendment context. *Id.* at 306-08. Under that doctrine, a confession obtained after an illegal arrest is not admissible at trial unless "'intervening events break the causal connection between the illegal arrest and the confession so that the confession is "sufficiently an act of free will to purge the primary taint."'" *Id.* at 306 (quoting *Taylor v. Alabama*, 457 U.S. 687, 690 (1982), quoting in turn, *Brown v. Illinois*, 422 U.S. 590, 602 (1975)).

The Court noted that "a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment . . . ." *Id.* at 306. *Compare United States v. Calandra*, 414 U.S. 338, 348 (1974) (Fourth Amendment exclusionary rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect") *with Missouri v. Seibert*, 124 S.Ct. 2601, 2616 (2004) (O'Connor, J., dissenting) ("no place for robust deterrence doctrine with regard to violations of *Miranda*"). Accordingly, "the *Miranda* presumption" "does not require that statements and their fruits be disregarded as inherently tainted." *Elstad*, 470 U.S. at 307.[6] The Court in *Elstad* concluded that, because a *Miranda* violation is not itself a constitutional violation, where police obtain an unwarned confession, the admissibility of a subsequent confession does not depend on whether it is the fruit of the first, but on whether it is "knowingly and voluntarily made." *Id.* at 309.

The Court observed in *Elstad* that one potential

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[6] This Court's decision in *Dickerson*, 530 U.S. at 440, that "*Miranda* is constitutionally based," did not undermine *Elstad*'s holding that a "fruits" analysis is not applicable to a *Miranda* violation. Indeed, the Court's citation to *Elstad*, *id.* at 441, "demonstrates the continuing validity" of the decision, *Patane*, 124 S.Ct. at 2628 (refusal to apply "fruits" analysis to exclude physical fruit of a claimed *Miranda* violation).

explanation why *Miranda* warnings were not initially given is that the task of defining "custody" for purposes of *Miranda* is unfortunately a "slippery one"; as a result, police cannot realistically be expected to make no errors whatsoever regarding when custody existed. *Id.* Therefore, the Court reasoned:

> [I]f errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

Id. at 309.

The task of determining what constitutes the functional equivalent of interrogation is likewise sometimes a "slippery one." In this case, for example, the suppression court and the Maryland Court of Appeals concluded that Officer Reese's statement was the functional equivalent of interrogation, (JA 357-358, 396), while the majority of Maryland's intermediate appellate court disagreed. (JA 388). Where judges are in disagreement regarding the propriety of a comment after invocation of the right to counsel, it cannot reasonably be expected that police officers will never err. Permitting consideration of curative measures "reflects a balanced and pragmatic approach" to enforcement of the *Edwards* rule. *See Seibert*, 124 S.Ct. at 2614-15 (Kennedy, J., concurring).

In *Elstad*, the Court held that where a police officer improperly obtains a statement that was unwarned but voluntary, the subsequent recitation of *Miranda* warnings

"serves to cure the condition that rendered the unwarned statement inadmissible." 470 U.S. at 311. A contrary ruling "effectively immunizes a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver," a result that "comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself." *Id.* at 312. The *Miranda* warnings prior to the second statement "ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id.* at 314. Similarly, in the *Edwards* context, an improper statement by a police officer after invocation of the right to counsel can be cured by subsequent events.

Almost 20 years after *Elstad*, in *Missouri v. Seibert*, 124 S.Ct. at 2605, this Court addressed the situation where, rather than an unintended *Miranda* violation, there was an intentional failure to give *Miranda* warnings, followed by a voluntary statement after administration and waiver of the *Miranda* rights. In determining whether the statement given after *Miranda* warnings was admissible, this Court reaffirmed that the fruit of the poisonous tree analysis was inapplicable. *Id.* at 2610 n.4 (plurality opinion); *id.* at 2616-17 (O'Connor, dissenting). Rather, the plurality stated that the "threshold issue" in a situation where the police questioned first and warned later is whether the warnings in that circumstance could function "effectively," as *Miranda* requires. *Id.* at 2610.

> Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Id. Thus, in a sequential confession case, the plurality found that the question to be asked is "whether in the circumstances the *Miranda* warnings could reasonably be found effective." *Id.* at n.4. If the answer is yes, the court can then address the issue of voluntariness of the waiver of rights. *Id.*

The plurality in *Seibert* noted that the two interrogations were close in time, conducted by the same officer at the same location, and similar in content. *Id.* at 2612. Moreover, nothing was said "to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the [unwarned] inculpatory statement." *Id.* These circumstances, the plurality found, challenged the "efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." *Id.* at 2613.[7] Thus, because the

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[7] The dissent agreed with the plurality that Seibert's statement could not be excluded under a "fruit of the poisonous tree" theory. 124 S.Ct. at 2616. The dissent noted that the plurality examined "the same facts and circumstances that a 'fruits' analysis would consider (such as the lapse of time between the two interrogations and change of questioner or location)," but explained that it did so for different reasons. *Id.* at 2617. "The fruits analysis would examine those factors because they are relevant to the balance of deterrence value," whereas in the *Miranda* context, the Court "looks to those factors to inform the *psychological* judgment regarding whether the suspect has been informed effectively of her right to remain silent." *Id.* The bases for these approaches are "entirely distinct, and they should not be conflated just because they

warnings could not have served the purpose of *Miranda*, that is, to give the accused the choice whether to speak, the postwarning statements were held inadmissible. *Id.*

In a concurring opinion, Justice Kennedy endorsed an *Elstad*-type analysis which "reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning." *Id.* at 2615. "[N]ot every violation of the [*Miranda*] rule requires suppression of the evidence obtained. Evidence is admissible when the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction." *Id.* at 2615.

In cases where a two-step interrogation technique was used deliberately to undermine *Miranda*, Justice Kennedy recommended that postwarning statements be excluded "unless curative measures are taken before the postwarning statement is made." *Id.* at 2616.

> Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.

Id. Because there was no evidence of curative measures, Justice Kennedy agreed with the plurality that Seibert's statement was inadmissible. *Id.*

An approach similar to that taken in *Elstad* and *Seibert* is appropriate in the context of an alleged *Edwards* violation. In the same way that a simple failure to administer *Miranda* warnings was held not to taint a voluntary and informed waiver

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function similarly in practice." *Id.*

in *Elstad*, one improper remark by a patrol officer should not preclude an accused from changing his mind and initiating further communication with the police.

The proper inquiry is whether the accused genuinely initiated communication with police, notwithstanding a prior *Edwards* violation. In making that determination, a trial court should look at the entire course of dealings between the police and the suspect after invocation of the right to counsel, including whether the police took curative measures before the suspect spoke to police. *See Seibert*, 124 S.Ct. at 2609-2613 (plurality opinion); *id.* at 2615-16 (Kennedy, J., concurring). Such an approach is consistent with the principle of "free choice" that is the basis for *Miranda* and *Edwards* and furthers the goal of giving the suspect "the power to exert some control over the course of the interrogation." *Moran*, 475 U.S. at 426.

C. Blake's choice whether to speak to the police was honored, and Blake initiated further contact with the police.

This is not a case where the police badgered a defendant into changing his decision to invoke his *Miranda* rights. Rather, a review of all the circumstances, including the curative measures and intervening circumstances that occurred after Officer Reese's improper remark, shows that Blake was aware that he did not have to talk to the police without his attorney, but that he changed his mind and initiated further contact with the police.

Apart from the one comment by a patrol officer, the police acted responsibly and in compliance with this Court's precedent from the outset of the arrest. The police officers initially conducting the search at Blake's home were carefully instructed not to speak with him if he was at home. (JA 237-238). Once at the police station, Detective Johns properly advised Blake of his *Miranda* rights, and when Blake indicated

that he did not want to talk to the police without an attorney, questioning immediately ceased. (JA 16-20, 51). Fifty minutes later, at 6:00 a.m., Detective Johns went to Blake's cell and handed him a copy of the arrest warrant and statement of charges, as required by Maryland law, and told him to read the documents carefully. (JA 22-23).[8] At this point, Officer Reese made the statement, "I bet you want to talk now, huh?" (JA 23).

Maryland does not contest in this Court that Officer Reese's statement was the functional equivalent of interrogation, but argues that the *Edwards* presumption, that Blake could not voluntarily waive his rights and give a statement without an attorney, is inapplicable under the circumstances of this case. The events that occurred after Officer Reese's statement cured the impropriety, terminated any police-initiated communication, and left it up to Blake to determine whether he wanted to initiate further contact, which he did.

Immediately after Officer Reese's statement, Detective Johns, the lead detective in the investigation, (JA 14-15),

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[8] As indicated *supra*, n.1, Maryland Rule 4-212(e) requires the police to inform the defendant of the nature of the offense charged and to serve a copy of the arrest warrant and statement of charges promptly after the arrest. (App. 3a). The Maryland Court of Appeals correctly held that "presenting an accused with a charging document, without more, is not the functional equivalent of interrogation." (JA 413). *See Rhode Island v. Innis*, 446 U.S. at 301 (statements "normally attendant to arrest and custody" do not constitute "interrogation"); *see also Arizona v. Roberson*, 486 U.S. at 687 (after invocation of right to counsel, police "are free to inform the suspect of the facts of the second investigation as long as such communication does not constitute interrogation").

admonished Officer Reese and effectively corrected this improper statement by loudly declaring: "No, he doesn't want to talk to us. He has already asked for a lawyer. We cannot talk to him now." (JA 23). Detective Johns then pushed Officer Reese out of the cellblock. (JA 23, 240). Blake made no statement before the police left his cell. *See Holman v. Kemna*, 212 F.3d 413, 419 (8th Cir.) (significant to finding that there was no *Edwards* violation, despite interrogation after invocation of right to counsel, was accused's failure to make statement before officer left cell, reducing likelihood that he was under compulsion to confess), *cert. denied*, 531 U.S. 1021 (2000).

It was not until approximately a half hour later, when Detective Johns brought him clothes, that Blake asked the question "I can still talk to you?" Blake's question is particularly telling: it shows that he not only felt no compulsion to speak, he was not even sure if he would be allowed to speak.

Significantly, Blake's question came after Blake had read the charging document and learned for the first time that his co-defendant was pinning the blame for the murder on him. (JA 355-356). Blake himself testified at the suppression hearing that, after reading the content of Tolbert's statement, he felt angry and betrayed and he was intent on letting the police know the truth. (JA 215-218).

After Blake asked if he could still talk to Detective Johns, Johns asked Blake if he was saying that he wanted to talk to the police, and Blake answered, "yes." (JA 26). Blake was brought back into the intake room and readvised of his *Miranda* rights, and he signed the form indicating he would speak to the police without an attorney. (JA 27-29; State's Exhibit 2). After Blake gave a statement, Detective Johns asked two questions of Blake: whether Blake at first said he did not want to talk to the police, and whether Blake later changed his mind and asked Johns if he could talk. (JA 33-36; State's Exhibit 5). Blake answered "Yes" to these questions and

signed his initials on the blank line next to the questions, (JA 35), confirming that it was his choice to speak with the police.

This scenario stands in stark contrast to the situation in *Edwards*, where, after Edwards invoked his right to counsel, he was told "he had" to talk with the police. 451 U.S. at 479. Nor was it a situation where, despite an "unequivocal request" during the initial interview that questioning cease until counsel was present, the accused was subsequently told that he "could not refuse" to talk with the police. *See Minnick*, 498 U.S. at 149, 153-54. Rather, Detective Johns's immediate response to Officer Reese's comment clearly conveyed to Blake that the police intended to honor his choice to communicate with them only through counsel. It firmly terminated any police-initiated interrogation and cured the impropriety of Officer Reese's comment.

In finding that Blake did not initiate further contact with the police, (JA 412-413), the Maryland Court of Appeals erred in focusing on factors that were irrelevant to the inquiry regarding initiation. The Maryland court set forth the following facts in finding that Blake did not initiate contact:

> Petitioner had requested counsel; he had been given a document that told him he was subject to the death penalty, when legally he was not; he was seventeen years of age; he had not consulted with counsel; he was in a cold holding cell with little clothing; an officer had suggested in a confrontational tone that petitioner might want to talk; and the misstatement as to the potential penalty as one of "DEATH" had never been corrected. There was no break in custody or adequate lapse in time sufficient to vitiate the coercive effect of the impermissive interrogation.

(JA 416-417).

In relying on these factors, the Court of Appeals conflated the factors relevant to the inquiry regarding initiation with the factors relevant to the separate issues of whether there was

interrogation and whether the waiver was voluntary. For example, that Blake had been given a document misstating that he was subject to the death penalty may have been properly considered by the Maryland court in determining if Officer Reese's comment constituted interrogation. (JA 413). The statement of penalties, however, was not pertinent to the issue of initiation as contemplated in *Edwards*, *i.e.*, whether the police badgered Blake to make a statement or, instead, respected Blake's request to speak only with counsel present.

Likewise, that Blake was 17 years old and in a cold holding cell wearing a muscle shirt and boxer shorts was not relevant to the issue whether Blake initiated further communication with the police. These factors may have been relevant to the ultimate inquiry regarding whether there was a knowing and voluntary waiver of the suspect's *Miranda* rights, which inquiry focuses on the totality of the circumstances, including, in addition to the fact that the accused reopened the dialogue, the background, experience and conduct of the accused. *See Bradshaw*, 462 U.S. at 1046. The appropriate inquiry in the *Edwards* context, however, is whether the accused's subsequent communication was based on police badgering or on the suspect's choice to change his mind about speaking to the police.

An additional error in the Maryland court's analysis is illustrated in its finding that Blake's question was "in direct response" to Officer Reese's comment and "was the product of impermissible interrogation" because there was insufficient attenuation. (JA 417-418). This focus on the existence of a causal connection is inconsistent with this Court's determination that a "fruits" analysis is inappropriate when dealing with a prophylactic rule to protect the Fifth Amendment right against self-incrimination. *See Seibert*, 124 S.Ct. at 2610 n.4 (plurality opinion); *id.* at 2616-17 (O'Connor, J., dissenting); *Elstad*, 470 U.S. at 306-09.

In finding that Detective Johns's actions did not cure the

impropriety in Officer Reese's comment, the court stressed that the time from Officer Reese's comment until Blake's question "was very short, indicating that the latter was a continuation of the former." (JA 417). The court was wrong in its analysis of what constitutes a "cure." Rather than focusing on the elapsed time between Officer Reese's comment and Blake's question, the focus should be on whether Detective Johns's subsequent actions cured the impropriety by making it clear that it was Blake's choice whether to talk to the police, and the police intended to honor that choice. The appropriate inquiry in the *Edwards* context, in determining whether there is a presumption that an accused cannot voluntarily waive his rights, is whether the police badgered the defendant and failed to honor the defendant's invocation of the right to counsel.

As indicated, *supra*, this case did not involve police badgering of the type with which this Court was concerned in *Edwards* and its progeny. Rather, "examin[ing] the surrounding circumstances and the entire course of police conduct with respect to the suspect," *Elstad*, 470 U.S. at 318, demonstrates that Detective Johns took immediate curative measures to negate the impropriety in Officer Reese's statement. The lead detective's response to the patrol officer's comment made it clear to Blake that the police intended to honor his choice whether to talk with the police or remain silent. Indeed, Blake's subsequent question to Detective Johns, asking if he could still talk with the police, confirms that Detective Johns's actions effectively conveyed that message. Thus, the purpose of *Miranda* and *Edwards* was satisfied.

Miranda and *Edwards* give an accused the right to choose between speech and silence, and Blake chose to speak. *See Barrett*, 479 U.S. at 529. Blake's choice to speak to the police was initiation of contact, and the *Edwards* presumption does not apply to his subsequent statements.

The scope of *Miranda* is limited to correcting only "the evils at which it was to strike." *Michigan v. Tucker*, 417 U.S.

at 439-40. Thus, before penalizing police error, the court "must consider whether the sanction serves a valid and useful purpose." *Id.* at 446. The Maryland court's suppression of Blake's statements in this case did nothing to promote the policy interests addressed by *Miranda* and *Edwards*. If the purpose of *Edwards* is to prevent badgering of a suspect who has invoked the *Miranda* right to counsel, then, under the circumstances of this case, that purpose was satisfied.

It does not serve the interests of justice for the State in this case to be deprived of critical evidence because of the offhand, impertinent remark of a patrol officer who walked back to the cell when Detective Johns was bringing Blake the charging document, which remark was immediately dismissed by the detective in Blake's presence. Consideration of the curative measures and intervening circumstances following Officer Reese's remark demonstrates that Blake chose to initiate further communication with the police. Accordingly, *Edwards*'s presumption of involuntariness is inapplicable and does not bar admission of Blake's statements.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the judgment of the Court of Appeals of Maryland be reversed.

Respectfully submitted,

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Rule 4-212. Issuance, service, and execution of summons or warrant.

(a) **General**. When a charging document is filed or a stetted case is rescheduled pursuant to Rule 4-248, a summons or warrant shall be issued in accordance with this Rule. Title 5 of these rules does not apply to the issuance of a summons or warrant.

(b) **Summons — Issuance.** Unless a warrant has been issued, or the defendant is in custody, or the charging document is a citation, a summons shall be issued to the defendant (1) in the District Court, by a judicial officer or the clerk, and (2) in the circuit court, by the clerk. The summons shall advise the defendant to appear in person at the time and place specified or, in the circuit court, to appear or have counsel enter an appearance in writing at or before that time. A copy of the charging document shall be attached to the summons. A court may order the reissuance of a summons.

(c) **Summons — Service.** The summons and charging document shall be served on the defendant by mail or by personal service by a sheriff or other peace officer, as directed (1) by a judicial officer in the District Court, or (2) by the State's Attorney in the circuit court.

(d) **Warrant — Issuance; Inspection.** (1) In the District Court. A judicial officer may, and upon request of the State's Attorney shall, issue a warrant for the arrest of the defendant, other than a corporation, upon a finding that there is probable cause to believe that the defendant committed the offense charged in the charging document and that (A) the defendant has previously failed to respond to a summons that has been personally served or a citation, or (B) there is a substantial likelihood that the defendant will not respond to a summons, or (C) the whereabouts of the defendant are unknown and the issuance of a warrant is necessary to subject the defendant to the jurisdiction of the court, or (D) the

defendant is in custody for another offense, or (E) there is probable cause to believe that the defendant poses a danger to another person or to the community. A copy of the charging document shall be attached to the warrant.

(2) In the Circuit Court. Upon the request of the State's Attorney, the court may order issuance of a warrant for the arrest of a defendant, other than a corporation, if an information has been filed against the defendant and the circuit court or the District Court has made a finding that there is probable cause to believe that the defendant committed the offense charged in the charging document or if an indictment has been filed against the defendant; and (A) the defendant has not been processed and released pursuant to Rule 4-216, or (B) the court finds there is a substantial likelihood that the defendant will not respond to a summons. A copy of the charging document shall be attached to the warrant. Unless the court finds that there is a substantial likelihood that the defendant will not respond to a criminal summons, the court shall not order issuance of a warrant for a defendant who has been processed and released pursuant to Rule 4-216 if the circuit court charging document is based on the same alleged acts or transactions. When the defendant has been processed and released pursuant to Rule 4-216, the issuance of a warrant for violation of conditions of release is governed by Rule 4-217.

(3) Inspection of the Warrant and Charging Document. Unless otherwise ordered by the court, files and records of the court pertaining to a warrant issued pursuant to subsection (d)(1) or (d)(2) of this Rule and the charging document upon which the warrant was issued shall not be open to inspection until either (A) the warrant has been served and a return of service has been filed in compliance with section (g) of this Rule or (B) 90 days have elapsed since the warrant was issued. Thereafter, unless sealed pursuant to Rule 4-201(d), the files and records shall be open to inspection.

(e) **Execution of warrant — Defendant not in custody.** Unless the defendant is in custody, a warrant shall be executed by the arrest of the defendant. Unless the warrant and charging document are served at the time of the arrest, the officer shall inform the defendant of the nature of the offense charged and of the fact that a warrant has been issued. A copy of the warrant and charging document shall be served on the defendant promptly after the arrest. The defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest or, if the warrant so specifies, before a judicial officer of the circuit court without unnecessary delay and in no event later than the next session of court after the date of arrest. The court shall process the defendant pursuant to Rule 4-216 and may make provision for the appearance or waiver of counsel pursuant to Rule 4-215.

(f) **Procedure — When defendant in custody.** (1) Same Offense. When a defendant is arrested without a warrant, the defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest. When a charging document is filed in the District Court for the offense for which the defendant is already in custody a warrant or summons need not issue. A copy of the charging document shall be served on the defendant promptly after it is filed, and a return shall be made as for a warrant. When a charging document is filed in the circuit court for an offense for which the defendant is already in custody, a warrant issued pursuant to subsection (d)(2) of this Rule may be lodged as a detainer for the continued detention of the defendant under the jurisdiction of the court in which the charging document is filed. Unless otherwise ordered pursuant to Rule 4-216, the defendant remains subject to conditions of pretrial release imposed by the District Court.

(2) Other Offense. A warrant issued pursuant to section (d) of this Rule for the arrest of a defendant in custody

for another offense may be lodged as a detainer for the continued detention of the defendant for the offense charged in the charging document. When the defendant is served with a copy of the charging document and warrant, the defendant shall be taken before a judicial officer of the District Court, or of the circuit court if the warrant so specifies, without unnecessary delay. In the District Court the defendant's appearance shall be no later than 24 hours after service of the warrant, and in the circuit court it shall be no later than the next session of court after the date of service of the warrant.

(g) **Return of Service.** The officer who served the defendant with the summons or warrant and the charging document shall make a prompt return of service to the court that shows the date, time, and place of service.

(h) **Citation — Service.** The person issuing a citation, other than for a parking violation, shall serve it upon the defendant at the time of its issuance.